



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 8, 1993

Mr. Robert Giddings  
Office of the General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2981

OR93-743

Dear Mr. Giddings:

On behalf of The University of Texas at Austin, you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).<sup>1</sup> Your request was assigned ID# 20842.

The University of Texas at Austin (hereafter "the University") received two open records requests for information regarding responses to the University's requests for proposals to provide a Voice Response Student Listening System. One request asks for a summary of the responses to the University's request for proposals. The other request asks for copies of the proposals submitted by bidders other than the requestor. You have submitted for review the proposals submitted in response to the University's request. You suggest that this information might be excepted from disclosure under sections 552.104 and 552.110 of the Government Code (former sections 3(a)(4) and 3(a)(10) of V.T.C.S. article 6252-17a) and that the companies that submitted the proposals do not want the proposals released. Pursuant to section 552.305, we notified the companies that submitted proposals of the open records requests.

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<sup>1</sup>We note that the Seventy-Third Legislature codified the Open Records Act as chapter 552 of the Government Code and repealed article 6252-17a, V.T.C.S. See Acts 1993, 73d Leg., ch. 268, §§ 1, 46. The codification of the Open Records Act in the Government Code is a nonsubstantive codification. *Id.* § 47.

We do not need to address the application of sections 552.104 and 552.110 to the first request because we conclude that the Open Records Act does not apply to the request. The Open Records Act applies only to records that are in existence when a request is made; governmental bodies have no obligation to compile or prepare new records in response to a request. Open Records Decision No. 572 (1990) at 1. The letter requesting a summary of the responses to the University's request for proposals clearly indicates that the requestor knows the summaries must be compiled from information held by the University. Furthermore, you have indicated that you do not possess any documents that might be considered summaries of the information requested. Thus, you need not comply with this request.

In regards to the second request, neither section 552.104 nor section 552.110 permit you to withhold the proposals submitted to the University. However, you are not required to furnish copies of all the proposals to the requestor; you are merely required to permit the inspection and copying of some of the proposals.

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This section is designed to protect a governmental body's purchasing interests by preventing a bidder from gaining an unfair advantage over other bidders; it is not designed to protect the interests of private parties submitting information to a governmental body. Open Records Decision Nos. 541 (1990) at 4; 592 (1991) at 8. Governmental bodies generally invoke this section to protect information regarding bids before the bidding process is over. Once the contract has been awarded, however, section 552.104 does not generally except bids from disclosure. To withhold bid information under section 552.104 after the contract has been awarded, a governmental body must show that some specific and actual competitive harm will result in the particular situation if the information is released. Open Records Decision No. 541 at 4-5.

You have not made the showing required to withhold information regarding bids for a contract that has been awarded under section 552.104. You indicate that the companies who submitted bids all requested that their bids be kept confidential. However, information cannot be withheld under the Open Records Act simply because the party submitting it requests that it be kept confidential. Open Records Decision No. 479 (1987) at 1. You also argue that disclosure of the bids would impair the University's ability to obtain similar information in the future. Although this argument may represent a valid policy basis for withholding the information, it does not constitute a valid legal basis for withholding the information. *Id.* at 2. This argument does not constitute a showing that the release of the bids will cause some specific and actual competitive harm. Therefore, you may not withhold the proposals under section 552.104.

Unlike section 552.104, section 552.110 is designed to protect the interests of an entity doing business with a governmental body. Section 552.110 excepts from required

public disclosure "trade secret and commercial and financial information obtained from a person and privileged or confidential by statute or judicial decision." In *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert denied*, 358 U.S. 898 (1958), the Texas Supreme Court adopted the Restatement of Torts definition of a trade secret. The following criteria determine whether information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner's] business; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken by [the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, § 757 cmt. b (1939); *See also* Open Records Decision No. 552 (1990). We must accept a claim that a document is excepted as a trade secret if a *prima facie* case for exception is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 592 (1991) at 2. However, when a governmental body or company fails to provide any evidence of the factors necessary to establish a trade secret claim, we cannot conclude that the trade secret prong of section 552.110 applies. Open Records Decision No. 402 (1983).

The companies that submitted bids to the University have not provided any evidence of any of the factors necessary to establish a trade secret claim.<sup>2</sup> In fact, none of the companies even responded to the notice of the open records request. Furthermore, none of the information contained in the proposals constitutes commercial or financial information made confidential by statute or judicial decision. *See* Open Records Decision No. 592 at 4-8. Therefore, you cannot withhold the proposals under section 552.110.

The fact that one of the documents includes a notation that it has been copyrighted does not change this result but does change the manner in which the records may be disclosed. Information is not automatically excepted from required public disclosure under the Open Records Act merely because it is copyrighted. *See* Attorney General Opinion JM-672 (1987) at 2-3. On the other hand, governmental bodies must comply with the copyright laws. Thus, a governmental body is not required to furnish copies of copyrighted records to requestors; it is merely required to make the records available for examination and copying by the requestor. Attorney General Opinion MW-307 (1981)

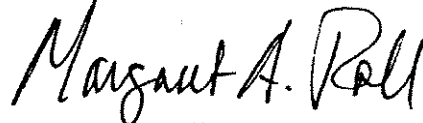
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<sup>2</sup>Because section 552.110 protects the interests of third parties, you were entitled to rely on the companies involved to establish that the information should be withheld under section 552.110.

at 2. Thus, although you must permit the requestor to examine the copyrighted proposal, you are not required to provide the requestor with a copy of the copyrighted proposal. You are, however, required to provide the requestor with copies of the other proposals, if the requestor requests copies.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open-records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Margaret A. Roll  
Assistant Attorney General  
Open Government Section

MAR/LRD/ho

Ref.: ID# 20842

Enclosures: Submitted documents

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